UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.

Plaintiff,

v.

SHORE TRANSIT, *et al.*,

Defendants.

Civil Action No. __-___

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff People for the Ethical Treatment of Animals, Inc. (ñPETAò) respectfully requests that the Court grant its Motion for Preliminary Injunction and enjoin Defendants from enforcing Shore Transitôs unconstitutional policy of censoring advertisements that Shore Transit deems ñpolitical,ò ñoffensive,ò ñcontroversial,ò ñobjectionable,ò or ñin poor taste.ò

PETA, the largest animal rights organization in the world, created two advertisements to advocate against the pain caused to animals by the meatpacking industry and the harms caused to workers by keeping Eastern Shore slaughterhouses operational during the COVID-19 pandemic. PETA seeks to place these advertisements on buses operated by Shore Transit, the public

transportation system for the Lower Eastern Shore of Maryland. Shore Transit refuses to accept PETAôs advertisements, on the grounds that they are ñtoo offensive for [its] market and political in nature.ò

Shore Transit is obligated to follow the Constitution. Its policy banning advertisements that it deems to be ñpolitical,ò ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor tasteò violates the First Amendment. Even assuming, for the purposes of this preliminary injunction motion, that Shore Transitôs advertising space constitutes a limited or nonpublic forum, Shore Transitôs restriction on advertising must be reasonable and viewpoint neutral. Shore Transitôs policy is neither.

First, Shore Transitôs policy is incapable of reasoned application. Shore Transit has not issued any guidance to help officials determine what topics are ñpolitical,ò ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor taste.ò Like the restrictions on ñpoliticalò speech struck down in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), Shore Transitôs advertising restrictions are unconstitutional because they fail to provide objective and workable rules for distinguishing between permitted and prohibited speech.

Second, Shore Transitôs policy is viewpoint discriminatory because it bans speech that Shore Transit deems to be ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor taste.ò As the Supreme Court recently held in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), government restrictions on ñoffensive,ò ñimmoral,ò or ñscandalousò speech constitute impermissible viewpoint discrimination.

Finally, Shore Transitôs policy is unconstitutionally vague because it fails to provide adequate notice about what speech is prohibited and because it invites arbitrary or selective enforcement by Shore Transitôs officials.

For these reasons, and as explained further in this Memorandum, PETA is likely to succeed on the merits of its facial and as-applied First and Fourteenth Amendment claims. Because PETAôs constitutional rights are being violated, PETA is suffering irreparable harm, and both the balance of harms and the public interest weigh heavily in favor of the issuance of an injunction.

Accordingly, the Court should grant PETAôs motion for a preliminary injunction.

BACKGROUND

I. Shore Transit's Advertising Spaces and Ad Review Process

Shore Transit, a division of the Tri-County Council for the Lower Eastern Shore of Maryland, is a regional public transportation authority. It operates the public bus system in Somerset, Wicomico, and Worcester Counties. According to its own website, advertising with Shore Transit is ñone of the best investments companies make with their advertising dollars.ò *See* Shore Transit, *Advertising*, https://bit.ly/3A9ARs4 (last accessed Aug. 12, 2021). Shore Transit encourages businesses and organizations to print their ads on the exterior and interior of their buses, in bus shelters, and on trash receptacles. These spaces ñopen the door on a highly visible medium for reaching large audiences of all ages, backgrounds and incomes.ò *Id.* Advertising with Shore Transit ñallow[s] advertisers to speak directly to transit riders with these external traveling billboardsò and provides access to a broad audience, allowing ñyou to communicate with families and professionals in their vehicles, people walking or shopping and tourists finding their way on the Lower Eastern Shore of Maryland.ò *Id.*

Shore Transit contracts with an advertising agent, Vector Media, to manage its advertising program. Vector Media sells advertising space on behalf of Shore Transit on static displays on commuter buses, bus shelters, and trash receptacles. In 2020 alone, Shore transit placed eighty-seven advertisements on its advertising spaces and collected more than $98,900 in revenue.

Declaration of Robin R. Cockey (ñCockey Decl.ò), Exh. F at 1.

On March 24, 2021, PETA filed a Maryland Public Information Act request with the Tri-County Council. Cockey Decl., Exh. A. PETAôs MPIA requests sought, *inter alia*, ñ[a]ll documents relating to Shore Transitôs standards for accepting or rejecting advertisements, including any advertising policy Shore Transit may administerò and ñ[a]ll documents concerning Shore Transitôs reasons for approving, not approving, or requesting modifications to advertisements submitted for Shore Transitôs system, including any communications with entities that submitted advertisements for approval.ò *Id.* at 1, 3. In its responses to these requests, the Tri-County Council produced the following documents: Shore Transitôs contract with Vector Media; meeting and agenda minutes; email correspondence concerning Shore Transitôs rejection of proposed advertisements promoting cannabis and cannabidiol (CBD) products; and the Maryland Locally Operating Transit System (LOTS) manual. Cockey Decl., Exh. B.

The minutes from the July 29, 2015 meeting of the Executive Board of the Tri-County Council for the Lower Eastern Shore of Maryland report that Shore Transitôs advertising agency ñasked if political advertisements are to be accepted.ò Cockey Decl., Exh. E at 9. The minutes explain that, ñ[f]ollowing discussion, the Executive Board decided to bring the matter before the Tri-County Council at the September meeting.ò *Id.* The minutes for the September 23, 2015 meeting reflect that the Tri-County Council discussed the matter and voted, deciding ñto not accept political ads.ò *Id.* at 14.

Shore Transitôs contract with Vector Media states that ñVector Media shall follow minimum standards in the approval of submitted advertising that will be displayed in the buses. . . . Political advertisements will not be accepted.ò Cockey Decl., Exh. D at 18. Shore Transitôs contract with Vector Media further states that ñShore Transit . . . reserves the right

to reject any advertising that it determines to be controversial, offensive, objectionable or in poor taste.ò *Id.* at 16. The contract also states that Shore Transit ñreserves the right to remove any offensive advertising at any time.ò *Id.* at 18. The Tri-County Council did not identify any other written policies defining the terms ñpolitical,ò ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor taste.ò

In addition to the advertisements at issue in this case, documents produced by the Tri-County Council in response to PETAôs public records request identify only one other set of advertisements that have been rejected by Shore Transitð commercial advertisements for medical marijuana and cannabidiol (CBD) products. On February 28, 2018, a senior account executive at Vector Media emailed Brad Bellacicco, the Director of the Shore Transit Division of the Tri-County Council, informing him that Vector Media had ñbeen approached by several companies in the Medical Cannabis business that would like to spend money on transit advertising in Marylandò and asking whether Shore Transit would accept these advertisements. Cockey Decl, Exh. E at 17. On March 13, 2018, Mr. Bellacicco responded: ñI have referred your question to [the Maryland Transit Administration] and the [Tri-County Council] Board. I doubt we will take their money because we are still firing people for smoking cannabis. Would be hypocritical to advertise it when we drug test.ò *Id.*

On March 10, 2020, Vector Mediaôs regional manager, Mark Sheely, emailed Mr. Bellacicco to ask whether Shore Transit would accept advertisements from the Hi Tide Dispensary, which ñoffer[s] legal CBD products and medical Marijuana.ò *Id.* at 20. Mr. Bellacicco responded: ñSorry but no. We have Federal Transportation funding and comply with FTA Drug and Alcohol testing program. Would be hypocritical to advertise for marijuana and fire people for using it.ò *Id.* at 19. When Vector Mediaôs representative asked

what the response would be if Hi Tide Dispensary ñwere only to advertise their CBD products,ò which are legal under both federal and Maryland law, Mr. Bellacicco responded: ñNo we need to be careful with the perception of supporting a position opposed to [the Federal Transit Administration] and risk our funding.ò *Id.*

II. Rejection of PETA's Proposed Advertisements

PETA is the largest animal rights nonprofit organization in the world, with more than 6.5 million members and supporters. Committed to fighting animal exploitation and asserting animalsô rights to have humans consider their best interests and to be free from suffering, PETA advocates against the pain caused to animals in laboratories, in the food industry, in the clothing trade, and in the entertainment industry, as well as in other contexts.

Advertising is one of the major ways in which PETA carries out its advocacy campaigns, including on public transit systems. On May 12, 2020, PETA submitted two advertisements to Shore Transit via Vector Media, the advertising agency with which the public transit system contracts. One advertisement depicted a photo of a young girl with a chicken, with accompanying text reading ñNo One Needs to Kill to Eat. Close the slaughterhouses: Save the workers, their families, and the animals.ò Cockey Decl., Exh. C at 2. The other advertisement contained the same text, but the word ñkillò was superimposed over an image of a knife with blood on it. *Id.* at 1. The advertisements were intended to advocate the closure of the slaughterhouses on the Eastern Shore and to encourage viewers not to purchase or eat animal food products. Vazquez Decl. ¶ 4.

Later that day, Mr. Sheely forwarded that request via email to Mr. Bellacicco, asking if Vector Media had permission to sell PETA the exterior bus advertisements. Cockey Decl., Exh. C at 4. On May 15, 2020, Mr. Sheely replied to PETAôs advertisement requests. He wrote, ñBelow is the response from Shore Transit about the ads you requested to run on their buses.

óAfter considerable consideration, we will decline the PETA ads. We find them too offensive for our market and political in nature.ôò Vazquez Decl., Exh. A.

On June 10, 2020, Gabe Walters, the PETA Foundationôs Manager of Litigation and Legislative Affairs, sent a demand letter on behalf of PETA to Shore Transit, addressed to Joseph Mitrecic, Chair of Tri-County Council Executive Board. Vazquez Decl., Exh. B. The demand letter stated PETAôs First Amendment concerns, asked for Shore Transit to send him any existing advertising policies, and requested that Shore Transit reverse its decision rejecting PETAôs ads. *Id.* Mr. Walters requested that Mr. Mitrecic respond by June 17, 2020. *Id.* As of the date of this filing, PETA has not received any response to this demand letter.

On March 31, 2021, one week after PETA filed its MPIA request, Mr. Bellacicco forwarded the email chain between himself and Mr. Sheely to several other Tri-County Council members with a message stating that ñ[u]pon . . . Mark Sheelyôs recommendation and considering the COVID situation unfolding in the area poultry plants, it was decided not to accept these ads. In the past we have rejected one for marijuana dispensary on the grounds we drug test our drivers per Federal law and should not promote the produce [sic] on our buses. . . . Our contract with Vector does allow us to review and reject ads.ò Cockey Decl., Exh. C at 3.

On July 22, 2021, PETA wrote to Mr. Sheely to renew its request to run the proposed advertisements on Shore Transitôs system. PETA asked for a response to its request by July 30. Vazquez Decl. ¶ 7; *see also* Vazquez Decl., Exh. C at 1. To date, PETA has not received a response to its request. Vazquez Decl. ¶ 7.

PETA still wishes to place the same advertisements, and similar advertisements, in Shore Transit advertising spaces. *Id.* ¶ 8. In addition, PETA anticipates that it will want to place other advertisements on Shore Transitôs advertising spaces, and that, because of PETAôs mission to

advocate against the purchase or creation of animal food products, Shore Transit is likely to reject those advertisements pursuant to its policy prohibiting advertisements that Shore Transit deems to be ñpolitical,ò ñcontroversial, ñoffensive,ò ñobjectionable,ò or ñin poor taste.ò *Id.* ¶¶ 8ï 9.

ARGUMENT

Under Rule 65 of the Federal Rules of Civil Procedure, this Court must weigh four factors when deciding whether to grant a motion for preliminary injunction: (1) has the movant shown a reasonable probability of success on the merits; (2) will the movant be irreparably harmed by denial of the relief; (3) will granting preliminary relief result in even greater harm to the non-moving party; and (4) is granting preliminary relief in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008); *see also, e.g.*, *W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

In cases involving the freedom of speech, the plaintiffôs claimed irreparable harm is ñinseparably linkedò to its likelihood of success on the merits. *W.V. Ass'n of Club Owners*, 553 F.3d at 298.

I. PETA Is Likely to Succeed on the Merits of Its Claim Because Shore Transit Cannot Meet Its Burden to Justify Its Restrictions on Speech.

The amount of flexibility the government has to restrict speech on government-controlled propertyð here, Shore Transitôs advertising spacesð depends on the type of property at issue and whether it is a ñtraditional public,ò ñdesignated public,ò or ñnonpublicò forum. *See e.g.*, *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs.*, 457 F.3d 376, 383 (4th Cir. 2006); *Goulart v. Meadows*, 345 F.3d 329, 248ï 49 (4th Cir. 2003).

A ñdesignated public forumò is government-owned property that does not qualify as a ñtraditionalò public forum (e.g., city streets or parks), but which the government has intentionally ñopened for expressive activity to the public.ò *Goulart*, 345 F.3d at 249 (citing *Warren v. Fairfax*

Cty., 196 F.3d 186 (4th Cir. 1999) (en banc)). Municipal advertising spaces, including advertisement spaces within city halls, public transit stations, and city buses have been found to be designated public fora based on the governmentôs decision to open such places for public expression. *See Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth*, 148 F.3d 242, 249ï 55 (3d Cir. 1998) (public transportation stations); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, 92 F. Supp. 3d 314, 326 (3d Cir. 2015) (public buses); *United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (city buses); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074ï 81 (9th Cir. 2001) (city hall). Content-based restrictions on speech in a ñdesignated public forumò are analyzed under strict scrutiny. *See e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 469ï 70 (2009).

A ñnonpublic forum,ò also known as a ñlimited public forum,ò is a venue that has not been opened to speech by the public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (discussing definition of nonpublic forum). The government creates a ñnonpublic forumò when it opens up space to the public for some main purpose other than facilitating speech in that space. For example, when the government operates a certain space as a polling place on Election Day and invites the public, subject to extensive regulations, into that space for the ñsole purpose of voting,ò restrictions on speech within the polling place should be assessed under nonpublic forum analysis. *Mansky*, 138 S. Ct. at 1886. If the government intentionally opens up its property for speech only by certain groups or for certain expressive purposes, the property may also properly be analyzed as a nonpublic forum. *E.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (government could create student activities fund as a nonpublic forum restricted to student groups meeting certain criteria); *Child. of the Rosary v. City of Phoenix*, 154 F.3d 972, 977ï 78 (9th Cir. 1998) (holding that public transit

advertising space was a nonpublic forum because it was reserved exclusively for commercial advertising).

Content-based restrictions on speech in a nonpublic forum must be ñboth reasonable and viewpoint neutral.ò *Child Evangelism*, 457 F.3d at 383 (citing *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 106ï 07 (2001)). This standard is ñmore exactingò than ordinary rational basis review, and the government bears the burden to prove the constitutionality of its restriction on the speech. *See Multimedia Pub. Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993) (holding that reasonableness review is more stringent than rational basis review because government restrictions on speech affect ñprotected First Amendment activity that is entitled to special solicitude even in this nonpublic forumò); *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F. Supp. 3d 661 (E.D. Va. 2020) (citing *NAACP v. City of Phila.*, 834 F.3d 435, 441 (3d Cir. 2016)), *appeals filed*, Nos. 20-1710 (filed Jun. 30, 2020), 20-1740 (filed Jul. 8, 2020).

Regardless of whether Shore Transitôs advertising space constitutes a designated public forum or a nonpublic forum, its policy is unconstitutional. *See Child Evangelism*, 457 F.3d at 383ï 84 (stating that the court ñneed not rule on [the] issueò of what type of forum elementary schoolôs take-home flyer forum was because it found the regulation to be viewpoint discriminatory and because the regulation provided no guidelines limiting the schoolôs discretion). First, Shore Transitôs ban on advertisements that it deems to be ñpolitical in nature,ò ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor tasteò is unreasonable because it is incapable of reasoned application by enforcement officials. Second, Shore Transitôs prohibition on advertisements that it deems to be ñcontroversial, offensive, objectionable, or in poor tasteò is viewpoint discriminatory. Each of these reasons is independently sufficient to conclude that PETA is likely to succeed on the

merits of its First Amendment claim. Finally, Shore Transitôs policy also violates the Fourteenth Amendmentôs Due Process Clause because it is unconstitutionally vague.

A. Shore Transit's Policy Is Unconstitutional Because It Is Incapable of Reasoned Application.

Shore Transitôs policy violates the First Amendmentôs baseline reasonableness requirement because it fails to ñarticulate some sensible basis for distinguishing what may come in from what must stay out,ò *Mansky*, 138 S. Ct. at 1888, and is therefore ñnot . . . capable of reasoned application,ò *id.* at 1892.

The Supreme Courtôs recent decision in *Mansky* is directly on point. There, the Court held that a Minnesota statute prohibiting the wearing of a ñpolitical badge, political button, or other political insigniaò in a polling place violated the First Amendment. *Id.* at 1883 (quoting Minn. Stat. § 211B.11(1) (2017)). The Court accepted that the interiors of Minnesotaôs polling places on Election Day were a nonpublic forum for speech, *id.* at 1886; that Minnesota was pursuing a permissible objective in restricting speech in order to try to maintain a calm atmosphere in the polling places, *id.* at 1887; and that Minnesota had ñgood intentionsò that were ñgenerally worthy of [the Courtôs] respect,ò *id.* at 1892. Yet the Court still struck down the statute as unreasonable because Minnesotaôs restriction on speech was ñnot . . . capable of reasoned application.ò *Id.* at 1892. The Court explained:

> [The statute] does not define the term ñpolitical.ò And the word can be expansive. It can encompass anything ñof or relating to government, a government, or the conduct of governmental affairs,ò Websterôs Third New International Dictionary 1755 (2002), or anything ñ[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state,ò American Heritage Dictionary 1401 (3d ed. 1996).

Id. at 1888; *see also id.* (ñUnder a literal reading of [the cited dictionary definitions of ópoliticalô], a button or T-shirt merely imploring others to óVote!ô could qualify.ò).

Although Minnesota issued a written policy to guide the statuteôs enforcement, the policy failed to cure the vagueness inherent in the term ñpolitical.ò On the one hand, Minnesotaôs policy guidance was ñclear enough,ò and likely capable of objective application, insofar as it construed the statute to prohibit ñitems displaying the name of a political party, items displaying the name of a candidate, and items demonstrating support of or opposition to a ballot question.ò *Id.* at 1889 (internal quotation marks and citation omitted). However, the policyôs statement that the statute prohibited ñ[i]ssue oriented material designed to influence or impact votingò did little more than replace the statuteôs unclear terms with another equally murky phrase. The Court criticized the provision as ñrais[ing] more questions than it answers,ò noting that Minnesota could not explain what qualifies as an ñissueò other than to say that it included anything about which a political candidate or party has ñtaken a stance.ò *Id.* at 1889. The Court pointed out that it was impossible to determine, for example, whether the phrases ñSupport the Troopsò or ñ#MeTooò would be banned, concluding:

> A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import.

Id. at 1889ï 90.

The Court likewise concluded that Minnesotaôs policy statement that the statute banned items ñpromoting a group with recognizable political viewsò about ñthe issues confronting voters in a given electionò also did not provide a sufficiently workable rule to save the statute. *Id.* at 1890. The Court questioned whether items featuring the ACLU, AARP, the World Wildlife Fund, or Ben & Jerryôs would be banned because they all ñhave stated positions on matters of public concern,ò *id.* at 1890 & n.5, or whether merely wearing a uniform for the Boy Scouts of America

would be prohibited, *id.* Minnesotaôs attempt to narrow the ban to groups that are ñsufficiently well-knownò did not make the prohibition workable, because ñthat measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it.ò *Id.*

The Court emphasized that, even in nonpublic fora, there must be some objectively ascertainable boundaries on the governmentôs discretion to restrict speech, observing that ñit is óself-evidentô that an indeterminate prohibition carries with it óthe opportunity for abuse, especially where it has received a virtually open-ended interpretation.ôò *Id.* at 1891 (cleaned up) (quoting *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)). Although the Court did ñnot doubt that the vast majority of [government officials] strive to enforce [the law] in an evenhanded manner,ò it emphasized that enforcement officialsô discretion ñmust be guided by objective, workable standards.ò *Id.* Otherwise, the Court warned, there is an impermissible risk that a government officialôs ñown politics may shape his view on what counts as ópolitical.ôò *Id.*[1]

As several federal courts of appeals have already recognized, *Mansky* applies with full force to public transit systemsô advertising policies. Last year, the Third Circuit applied *Mansky* in holding that the Southeastern Pennsylvania Transportation Authorityôs policy prohibiting

[1] *Mansky* is the most recent in a long line of Supreme Court precedents declaring that a restriction on speech violates the First Amendment if it does not meaningfully constrain the discretion of enforcement officials. *See e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 537ï38 (1981) (Brennan, J., concurring) (collecting cases). In these cases, the Court has repeatedly cautioned that ñthe danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forumôs use.ò *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). *See also Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 372 (D.C. Cir. 2018) (noting that inquiries into ñunbridled discretion,ò ñvagueness,ò and ñreasoned applicationò ñall pose a single challenge: [To] determine whether [a restriction] is so broad as to provide [the government] with no meaningful constraint upon its exercise of the power to squelchò).

advertisements that are ñpolitical in natureò or that address ñpolitical . . . issuesò violated the First Amendment because it was incapable of reasoned application. *Ctr. for Investigative Reporting v. Se. Pa. Transp. Auth.*, 975 F.3d 300, 314ï 17 (3d Cir. 2020) [hereinafter *CIR*], *petition for cert. filed*, No. 20-1379 (filed Mar. 29, 2021). The Third Circuit reasoned that SEPTAôs ñill-definedò restriction on ñpoliticalò advertisements, combined with ñthe absence of guidelines cabining SEPTAôs General Counsel's discretion in determining what constitutes a political advertisement,ò gave rise to an impermissible risk of arbitrary or selective application that rendered the challenged restrictions facially unconstitutional. *Id.* at 316.

Similarly, in *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, 978 F.3d 481 (6th Cir. 2020) [hereinafter, *AFDI v. SMART*], the Sixth Circuit held that the Detroit public transit systemôs policy banning ñpoliticalò advertisements was incapable of reasoned application because it ñoffer[ed] no ósensible basis for distinguishing what may come in from what must stay out.ôò *Id.* at 485ï 86 (quoting *Mansky*, 138 S. Ct. at 1888). Like the Third Circuit in *CIR*, the Sixth Circuit observed that the absence of ñwritten down óobjective, workable standardsô to define the word ópoliticalô and guide officials on the steps to take when deciding if specific ads qualify,ò significantly ñincrease[d] the opportunity for abuseò in [enforcement officialsô] application of the policy. *Id.* at 497 (quoting *Mansky*, 138 S. Ct. at 1891). The court accordingly concluded that the public transit system ñha[d] yet to create the workable standards that it needs for óreasoned applicationô of its ban.ò *Id.* (quoting *Mansky*, 138 S. Ct. at 1891ï 92).

Other courts have suggested in dicta that they would reach similar conclusions. In *Amalgamated Transit Union Local 1015 v. Spokane Transit Authority*, 929 F.3d 643 (9th Cir. 2019), the Ninth Circuit held that the Spokane Transit Authorityôs ban on ñpublic issueò

advertisingð which the transit authorityôs CEO characterized ñas a prohibition on ads that would generate ópublic interest around issues about which there could be an economic, social or political debate,ò *id.* at 653ð was unconstitutional as applied to the rejection of a labor union advertisement. The court did not invalidate the prohibition on its face, because the union did ñnot challenge the trial courtôs conclusion that STAôs policy is definite and objective.ò *Id.* at 654. But it was skeptical that the transit authorityôs ñpublic issueò standard would survive facial review, observing that the ñstandard lacks objective criteria to provide guideposts for determining what constitutes prohibited ópublic issueô advertising.ò *Id.* at 655.

Along similar lines, in *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 901 F.3d at 372 [hereinafter *AFDI v. WMATA*], the D.C. Circuit reversed a district court decision upholding WMATAôs ban on ñ[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions.ò *Id.* at 361, 373. The D.C. Circuit explained that *Mansky*, which was handed down after the appeal was fully briefed, ñinvites arguments about whether [WMATAôs policy] is capable of reasoned application.ò *Id.* at 372. It concluded that, on remand, ñAFDI should be given an opportunity to refine its argument and to supplement the recordò with information about how the restriction has been applied, which would inform the analysis ñas to whether it is capable of reasoned application.ò *Id.* at 373.

Shore Transitôs undefined restrictions on advertisements that it deems ñpolitical,ò ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor tasteò suffer from the same constitutional defects as the advertising policies struck down in *CIR* and *AFDI v. SMART*. As in those cases, Shore Transitôs restrictions impose undefined prohibitions on speech while failing to provide any written guidance for judging what is permitted and what is prohibited. As a result, Shore Transitôs

policy affords enforcement officials virtually unfettered discretion to censor speech according to their own whims and prejudices, creating an intolerable risk of arbitrary or selective enforcement.

This risk is not hypothetical. The Tri-County Councilôs response to PETAôs public records request identifies only two types of advertisements that have been rejected by Shore Transit. The first are advertisements for medical marijuana and CBD products, which were rejected in part because Shore Transitôs director believed that they could be perceived as ñsupporting a position opposed to [the Federal Transit Administration].ò Cockey Decl., Exh. E at 19. The second are the PETA advertisements at issue here. Mr. Bellaciccoôs email to the other Tri-County Commission members indicates that PETAôs proposed advertisements were rejected because of ñthe COVID situation unfolding in the area poultry plants.ò Cockey Decl, Exh. C at 3. In other words, when Shore Transit told PETA that its advertisements were ñtoo offensive for [its] market and political in nature,ò Vazquez Decl., Exh. A, it meant that the advertisements highlighted the discomforting fact that the Eastern Shoreôs poultry plants have contributed to the spread of COVID-19. *See, e.g.*, Scott Dance, *Coronavirus Has Killed 5 Poultry Plant Workers and Infected More Than 200 Other Employees on Maryland's Eastern Shore*, Balt. Sun, (Jun. 12, 2020, 1:05 PM), https://bit.ly/3rOSYAN. It thus appears that Shore Transit is enforcing its advertising restrictions to appease its partners in the federal government and the local business community, at the expense of dissenting viewpoints.

B. Shore Transit's Advertising Policy Is Viewpoint Discriminatory.

Shore Transitôs ban on advertisements that it deems ñcontroversial, offensive, objectionable or in poor tasteò is also impermissibly viewpoint based.

ñViewpoint discrimination is anathema to free expression and is impermissible in both public and nonpublic fora.ò *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296 (3d Cir. 2011) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) and *Perry*

Educ. Ass'n., 460 U.S. at 46). Viewpoint discrimination occurs when the government ñsuppress[es] expression merely because public officials oppose the speakerôs view.ò *Perry Educ. Ass'n*, 460 U.S. at 46. ñOnce the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not.ò *Id.* at 61.

As the Supreme Court recently held in *Matal*, restrictions on speech that the government deems ñoffensiveò are viewpoint discriminatory because ñ[g]iving offense is a viewpoint.ò 137 S. Ct. at 1763 (opinion of Alito, J) (holding that the Lanham Actôs nondisparagement clause is facially viewpoint discriminatory); *see also Iancu*, 139 S. Ct. at 2299 (same for Lanham Actôs prohibition on ñimmoralò and ñscandalousò trademarks). As Justice Kennedy warned in his *Matal* concurrence, ña speech burden based on audience reactions is simply *government* hostility and intervention in a different guise.ò 137 S. Ct. at 1767 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). ñThe speech is targeted, after all, based on the governmentôs disapproval of the speakerôs choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive.ò *Id.*

That is precisely what Shore Transitôs policy does here. Shore Transit is rejecting advertisements based on apprehensions that these advertisements could be perceived as opposing the interests and positions of the meatpacking industry and the Federal Transit Administration. Such viewpoint-based restrictions are unconstitutional, even in a nonpublic forum. *See Perry Educ. Ass'n*, 460 U.S. at 61ï 62; *see also, e.g.*, *Planned Parenthood v. Chi. Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985) (ñWe question whether a regulation of speech that has as its touchstone a government officialôs subjective view that the speech is ócontroversialô could ever pass constitutional muster.ò (citations omitted)); *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87

(1st Cir. 2004) (transit agencyôs rejection of marijuana advertisement was unconstitutional, even in a non-public forum, in part because of officialsô improper motive).

C. Shore Transit's Policy Is Unconstitutionally Vague.

Shore Transitôs policy also violates the Fourteenth Amendmentôs Due Process Clause because it is unconstitutionally vague. ñA statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what [speech] it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.ò *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chi. v. Morales*, 527 U.S. 41, 56ï 57 (1999)); *accord Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359, 370ï 71 (4th Cir. 2012). An unconstitutionally vague statute or regulation ñfails to give adequate warning of what activities it proscribes or fails to set out óexplicit standardsô for those who must apply it.ò *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108ï 14 (1972)). ñ[T]he requirement that a legislature establish minimal guidelines to govern law enforcementò is ñperhaps the most meaningful aspect of the vagueness doctrine.ò *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

For all the reasons articulated in Section I.A. *supra*, Shore Transitôs policy of prohibiting advertisements that are ñpolitical,ò ñcontroversial,ò ñoffensive,ò ñobjectionable,ò or ñin poor tasteò is unconstitutionally vague because it fails to provide an advertiser a reasonable opportunity to understand what it prohibits and because it confers unbridled discretion on Shore Transitôs enforcement officials. *See White Coat Waste Project*, 463 F. Supp. 3d at 708ï 10 (holding that a public transit systemôs restriction on ñpolitical adsò was unconstitutionally vague as applied to White Coat Waste Project, whose advertisement was barred because the systemôs communications

director determined White Coat Waste Project to be an ñanimal cruelty related nonprofitò and, therefore, ña political action groupò).

II. PETA's Ongoing Loss of First Amendment Freedoms Constitutes "Irreparable Injury" Warranting a Preliminary Injunction.

In a First Amendment case, a plaintiff who establishes a likelihood of success on the merits presumptively establishes irreparable harm as well. *W.V. Ass'n of Club Owners*, 553 F.3d at 298. This is because the ñloss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.ò *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, PETAôs loss of access to Shore Transitôs advertising space constitutes irreparable harm for which no adequate remedy exists at law. A preliminary injunction is necessary to remedy this injury to PETAôs First Amendment rights.

III. An Injunction Will Not Harm Shore Transit Nor Impair the Public Interest.

PETAôs likelihood of success on the merits also tips the third and fourth preliminary injunction factors in its favor. Defendants would be ñin no way harmed by issuance of a preliminary injunction which prevents [them] from enforcing a regulation, which, on this record, is likely to be found unconstitutional.ò *Albemarle Cty. Sch. Bd.*, 354 F.3d at 261. And ñupholding constitutional rights serves the public interest.ò *Id.* In particular, the public has a strong interest in being able to access Shore Transitôs advertising space free from the constraints of an advertising policy that violates both the Free Speech Clause (as incapable of reasoned application and viewpoint discriminatory) and the Due Process Clause (as void for vagueness).

IV. The Court Should Waive the Bond Requirement.

Typically, a party seeking a preliminary injunction is required to post a bond sufficient to cover the damages inflicted on a party found to have been wrongly enjoined. Fed. R. Civ. P. 65(c).

However, the district court ñretains the discretion to set the bond amount as it sees fit or waive the security requirement.ò *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013) (collecting cases); *see also Md. Dep't of Hum. Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1483 n.23 (4th Cir. 1992) (ñ[The District Court has] discretion to set a bond amount of zero where the enjoined or restrained party faces no likelihood of material harm.ò). Because Defendants would suffer no damages as a result of the preliminary injunction requested by PETA, and because the balance of harms strongly favors PETA, the Court should waive the bond requirement.

CONCLUSION

For all the reasons set forth above, Shore Transitôs policy of rejecting advertisements that it deems to be ñpolitical,ò ñoffensive,ò ñcontroversial,ò ñobjectionable,ò or ñin poor tasteò violates the First and Fourteenth Amendments, both facially and as applied to PETA. Because all four of the preliminary injunction factors favor PETA, the Court should enter a preliminary injunction prohibiting Defendants from enforcing Shore Transitôs unconstitutional advertising policy and issue an order requiring Defendants to provide advertising space to PETA on equal terms to other advertisers.

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Respectfully submitted,

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